of the plaintiff as mortgagee should come into operation as to the whole or part of the consideration money only on payment of the whole. If a part remained unpaid, the defendant could sue to recover it or for damages; but all the same the plaintiff would be entitled from the date of the document to hold the land as security for so much as was paid then. The fault was not the plaintiff's that only a part but not the whole of the consideration money was paid. It was the first defendant who was to blame, because, as found by the lower Courts, after having executed the mortgage to the plaintiff and promised to receive the rest of the money (Rs. 525) later on while executing a mortgage on a stamped paper, he, in breach of that agreement, went and mortgaged the same property to defendant No. 2 for the same amount which the plaintiff had bound himself to advance. Under these circumstances, the plaintiff is entitled to hold the mortgage good for the sum of Rs. 775. Though the plaintiff's mortgage was registered after the 2nd defendant's, yet as it was prior in point of execution, it operated from the latter date, and the case is governed by our decision in Second Appeal No. 221 of 1904 delivered this day[1].

We reverse the decree of the lower Appellate Court and restore that of the Subordinate Judge with costs of both the appeals on defendants 1 and 2, except defendant No. 3's costs in this Court, which must be paid by the appellant. Defendant 3's cross-objections are rejected as no Court-fee was paid.

Decree reversed.

(1) *Ante* p. 42.

ORIGINAL CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Russell.

BACHOO HARKISONDAS (ORIGINAL PLAINTIFF), APPELLANT, *v.* MANKOREBAI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1904 *January* 25.

Hindu Law—Adoption by widow—Authority to adopt—Joint Family—Gift to daughter out of joint property—Limits of propriety.

Where the widow of a deceased coparcener in a joint Hindu family, under an authority to adopt, given to her by her husband's will, adopted a son, and, prior to such adoption, a posthumous son was born to the other coparcener,

* Suit No. 128 of 1901; Appeal No. 1244.

1904.

BACHOO v. MANKOREBAI.

Held (upholding Tyabji, J.), the adoption was valid.

The sole-surviving member of a joint Hindu family, owning property worth from Rs. 10 lacs to Rs. 15 lacs, out of the income of such property, made a gift of Rs. 20,000 to his daughter and only child.

Held (reversing Tyabji, J.), the gift was valid, and did not exceed the limits of propriety.

APPEAL from Tyabji, J.—Harkisondas Nagardas and Bhagwandas Nagardas were brothers, living in union as to food, worship and estate.

On the 14th September, 1900, Harkisondas died, leaving, as his survivors, his wife Gangabai, who was *enceinte*, and his brother Bhagwandas.

On the 5th November, 1900, Bhagwandas, out of the joint family property, made a gift of Rs. 20,000, in Government Promissory Notes, to Naval, his daughter and only child.

On the 30th November, 1900, he made a will, of which the 9th clause was as follows:—

"I hereby direct my wife to adopt a son to me, but such adoption must be made with the consent of Sir Bhalachandra Krishna and Ráo Bahádur Ghanesham Nilkanth Nadkarni. Such adoption is to be made even though a son is born to my brother's widow. In the event of a son being born to my brother's widow, however, my wife should, before making the adoption, enter into an agreement with the adopted son, or his proper guardian, that such adopted son shall be bound to accept, as valid, the provisions hereby made for my daughter Navalbai and my wife."

Bhagwandas died on the 17th December, 1900, and the plaintiff Bachoo, the posthumous son of Harkisondas Nagardas, was born on the following day.

On the 13th February, 1901, Mankorebai, in accordance with the directions given to her by the will of her husband Bhagwandas, adopted Nagardas Pitamber as her son.

Gangabai, thereupon, as the mother and next friend of the plaintiff, filed a suit in the High Court of Justice at Bombay.

The relief claimed in the plaint was, *inter alia*, that it might be declared that the plaintiff was solely entitled to the ancestral property specified therein; that his uncle Bhagwandas had no power to deal with the same by his will; that the 5th defendant, Nagardas, was not the adopted son of the said Bhagwandas, and

that the said Nagardas was not entitled to any interest in the said ancestral property.

The plaintiff also contended in the suit that the gift of Rs. 20,000, Government Promissory Notes, made by Bhagwandas to Naval on the 5th November, 1900, was bad.

On the 4th October, 1902, a decree in the suit was passed by Mr. Justice Tyabji, who upheld the adoption, but decided against the validity of the gift. The judgment contained the following passages:—

"The first objection to the adoption is that Bhagwandas was joint with the plaintiff Bachoo, who must be taken to have been in existence at the time of Bhagwandas' death, though born afterwards. It is argued that there can be no valid adoption into a joint family even if such adoption is made with the express authority of the husband. Numerous authorities were cited to me on this point, not always reconcilable with each other and laying down more or less conflicting principles, but it seems to me that sitting as a single Judge, in a Court of first instance, the point is not open to me for discussion. I am concluded by the decision of the Privy Council in *Sri Raghunadha* v. *Sri Brozo Kishoro*(1), as explained and acted upon by the Calcutta High Court in *Surendra Nandan* v. *Sailaja Kant Das*(2), where the authorities bearing on this point were fully discussed and it was decided, that when the widow adopts with the full authority of her husband, the adoption, even into a joint family, is valid and the adopted son takes an interest in the property accordingly."

"The next question I have to decide is as to the validity of the gift of Government Promissory Notes of the nominal value of Rs. 20,000, made by Bhagwandas to his daughter Navalbai, a few days before his death. The *factum* of the gift is hardly disputed. It was clearly proved by the evidence of Navalbai herself and by that of the 3rd defendant, Goverdhandas Shivram. The question before me is not whether the gift was made, but whether it was valid. It is contended on behalf of the plaintiff that Bhagwandas was the head of the family and the manager of the family and, at the time, the only member of the family in actual existence, inasmuch as Bachoo had not then been born, and that, as such, he must necessarily have the power of making reasonable gifts out of the joint estate. It was further contended, that though Rs. 20,000 be a large sum in itself, it was not an unreasonable amount for a father in Bhagwandas' position to give to his only daughter when he was about to die. It is impossible not to see the force of these arguments, but after having given the question my best consideration, I have come to the conclusion that Bhagwandas could not make a valid gift of this large sum of money, even to his own daughter. It is not necessary for me to say, and I do not say, that the manager of a Hindu family may not make ordinary gifts, or presents, on

(1) (1876) 3 I. A. 154 p. 157. (2) (1891) 18 Cal. 385.

1904.

BACHOO v. MANKOREBAI.

suitable occasions, either to the members of the family, or to strangers, but I think this power must be confined to such occasions, as are usual, and to such presents as are customary. Now Bhagwandas undoubtedly could, in my opinion, have given this sum of Rs. 20,000 to Naval, on her marriage, as a gift, or could have spent it on making ornaments for her. This would have been usual and in accordance with Hindu customs and with Bhagwandas' position in life, but this gift in question was not made on any such occasion. There was no need for it; Navalbai was entitled to be suitably and properly married out of the family funds. She was entitled to be suitably maintained till her marriage, but there is no evidence before me to show that it is usual for Hindu fathers to make gifts to their children, on the point of death and in anticipation of marriage, and I am therefore of opinion that this gift is invalid. This conclusion is, I think, fully borne out by the authorities—vide *Gangubai* v. *Ramanna*(1), *Vrandavandas* v. *Yamunabai*(2), *Parvati* v. *Ganpatram*(3), *Ganga Bisheshar* v. *Pirthi Pal*(4)."

Raikes and *Setlur*, for the appellant (plaintiff):—Bachoo's rights date from his conception. Therefore, at or before Bhagwandas' death he was the joint owner with Bhagwandas of the whole property. On Bhagwandas' death he became the sole and absolute owner of the property: Holland on Jurisprudence, page 83; Mayne on Hindu Law, sections 359, 360. If he had been of age, he might have sold the whole property, or he might have given it away.

Mankorebai cannot, by reason of a power given to her to adopt, divest the estate, which has vested in the plaintiff, and thus reduce his position to that of a coparcener with her adopted son: *Payapa* v. *Appanna*(5), *Krishna* v. *Sami*(6), *Chandra* v. *Gojarabai*(7), *Babu Anaji* v. *Ratnoji*(8).

The case of *Sri Raghunadha* v. *Sri Brozo Kishoro*(9), which was followed by *Surendra Nandan* v. *Sailaja Kant Das Mahapatra*(10), does not apply here, because the property there was impartible and bequeathable by will.

Lowndes with *Scott* (Advocate General), *Setalvad* and *Bhandarkar*, for the respondents (defendants):—Once a family is joint,

(1) (1866) 3 Bom. H. R. 63 (A. C. J.).
(2) (1875) 12 Bom. H. C. R. 229.
(3) (1893) 18 Bom. 177.
(4) (1880) 2 All. 635.
(5) (1898) 23 Bom. 327.
(6) (1885) 9 Mad. 64.
(7) (1890) 14 Bom. 463.
(8) (1895) 21 Bom. 319.
(9) (1876) 3 I. A. 154.
(10) (1891) 18 Cal. 385.

its property remains joint family property so long as a single coparcener remains. A sole surviving coparcener is not an absolute owner. He holds the family property, subject to his holding it as a co-sharer, on a son being introduced. A son can be introduced by adoption as well as by birth. Therefore the adoption of a son does not in fact divest the estate of the coparcener, but merely introduces a co-sharer into the family.

All the cases show that the interest of coparceners in the property has no bearing on the law of adoption: *Vithoba* v. *Bapu*[1], *Vasudeo* v. *Ramchandra*[2]. The best test of the propriety of an adoption is whether it was authorised by the husband. Where the husband's authority is wanting, the defect can be remedied by the consent of the coparceners: Mayne's Hindu Law, sections 107, 108. The need of such consent does not arise from their rights in the property but from their relationship: see Candy, J., in *Vithoba* v. *Bapu*[1] at p. 128.

Where the husband has given authority in his life-time, the consent of the kinsmen is unnecessary, because such authority conclusively shows the propriety and necessity of the adoption: *Sri Raghunadha* v. *Sri Brozo Kishoro*[3], *Surendra Nandan* v. *Sailaja Kant Das*[4], *Chandra* v. *Gojarabai*[5].

JENKINS, C. J.:—This appeal arises out of a suit brought by Bachoo Harkisondas, a minor suing by his next friend, whereby it is sought to establish an exclusive title in him to the property described in the plaint, and to question the legality of an alleged adoption of Nagardas Pitamber, the 5th defendant. The suit has also by arrangement been treated as calling in question the validity of a gift of Government Promissory Notes to the amount of Rs. 20,000 in favour of the 6th defendant, Naval.

The facts necessary to understand the contest between the parties can be briefly stated. Harkisondas and Bhagwandas, the sons of Nagardas, lived in union as to food, worship and estate. Harkisondas died on the 14th September, 1901, leaving a widow, Gangabai, the 7th defendant. On the 30th November, 1900, Bhagwandas made a will, and thereby (among other things) he

(1) (1890) 15 Bom. 110.
(2) (1896) 22 Bom. 551.
(3) (1876) 3 I. A. 154.
(4) (1891) 18 Cal. 335.
(5) (1890) 14 Bom. 463.

1904.

BACHOO v. MANKOREBAI.

provided in the 9th clause as follows:—"I hereby direct my wife to adopt a son to me, but such adoption must be made with the consent of Sir Bhalachandra Krishna and Ráo Bahádur Ghansham Nilkant Nadkarni; such adoption is to be made even though a son is born to my brother's widow. In the event of a son being born to my brother's widow, however, my wife should, before making the adoption, enter into an agreement with the adopted son or his proper guardian that such adopted son shall be bound to accept as valid the provisions hereby made for my daughter Navalbai and my wife."

On the 17th December, 1900, Bhagwandas died, leaving a widow, Mankorebai, the 4th defendant, and a daughter, Naval, the 6th defendant, but no other issue.

On the 18th of December, 1900, the plaintiff was born, and he is thus the posthumous son of Nagardas, his mother being Gangabai. On the 13th of February, 1901, Mankorebai, the widow of Bhagwandas, with the prescribed consent purported to adopt Nagardas Pitamber, the 5th defendant. It is this adoption that has given rise to this suit. The gift to Naval of Rs. 20,000 Government Promissory Notes was made on the 5th of November by her father Bhagwandas. The plaintiff's contention is that both the adoption and the gift are bad. The case came on for trial before Mr. Justice Tyabji, who, by his decree, upheld the adoption, but decided against the gift. From this decree the case comes before us on appeal by Bachoo, who questions its propriety so far as it upholds the adoption, and on cross-appeal by Naval, who disputes its correctness so far as it relates to the gift. The principal question is as to the validity of the adoption. The appellant maintains that it is open to many objections, but of these that founded on an allegation of impropriety of motive has not been argued before us, but merely mentioned, because it is covered by authority binding on us. The leading objection to the adoption has been that it was of no effect, inasmuch as before it was made the property had become vested solely in the appellant Bachoo, and for this contention reliance has been placed upon the case of *Mussumat Bheobun Moyee Debia* v. *Ram Kishore Acharji Chowdhry*[1]. But when this decision is closely examined,

(1) (1865) 10 M. I. A. 279.

it is clear that it is not an authority governing the present case. In contrast with this case, and as furnishing a more apposite delineation of the principle that should govern here, I may refer to the case of *Sri Raghunadha* v. *Sri Brozo Kishoro*[1], where a holder of an impartible Zamindári died, leaving a widow and a half-brother, with whom in his life he was united and formed a joint family, governed by the law of the Mitakshara. On the Zamindár's death the half-brother succeeded to the sole enjoyment of the Zamindári. Subsequently the deceased Zamindár's widow, in pursuance of an authority vested in her by her husband, adopted a son, and in the litigation that ensued it was held that the adopted son had a title which prevailed over that of the adoptive father's half-brother. This decision was followed by the Calcutta High Court in *Surendra Nandan* v. *Sailaja Kant Das Mahapatra*[2] which in its circumstances is undistinguishable from the present case. It has, however, been argued before us that the Calcutta case was wrongly decided, and that the decision of the Privy Council in *Raghunadha's* case proceeded on considerations that do not apply here. No doubt the property claimed in *Raghunadha's* case was impartible, but at one time it was the common notion that even in impartible property all the male members of a joint family were coparceners, subject to the qualification that the enjoyment was by one member of the family alone, and it was considered, rightly or wrongly, that there was warrant for this view, in a number of decisions of the Privy Council and notably *Naragunty* v. *Vengama*[3], *Shivagunga case*[4], *The Tipperah case*[5], *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Venkondara*[6], *Chowdhry Chintamun Singh* v. *Mussamut Nowlukho Konwari*[7]. I mention these cases as to all of them Sir James Colville, who delivered the judgment in *Raghunada's* case, was a party; and if it was his view that the impartible Zamindári belonged to the whole family, then the decision in *Raghunada's* case would seem to have proceeded on circumstances very

(1) (1876) 3 I. A. 154.
(2) (1891) 18 Cal. 385.
(3) (1861) 9 M. I. A. 66 at p. 86.
(4) (1863) 9 M. I. A. 543, 589.
(5) (1869) 12 M. I. A. 523 at p. 540.
(6) (1870) 13 M. I. A. 333 at p. 339.
(7) (1875) 2 I. A. 263 at pp. 269, 270.

1901.

BACHOO v. MANKOREBAI.

closely resembling those with which we are now dealing. But whatever may have been the opinion that prevailed at that time, it has now been definitely decided by the Privy Council in *Rani Sartaj Kuari* v. *Rani Deoraj Kuari*(1) and in *Sri Raja Rao Venkata Surya* v. *Court of Wards*(2), that in impartible properties there is no coparcenery, so that in the light of these later decisions it cannot be said that the conditions in the *Raghunadha's* case were in all respects identical with those now under consideration. But is not the identity of the conditions in the two cases sufficiently close to furnish good reason for saying that the decision of the Privy Council in *Raghunadha's* case covers that with which now we are concerned? In *Raghunadha's* case the family was undivided: prior to the adoption there was only one surviving member of the family; and in that member the whole property had vested. Those conditions exist here; the only difference is that there the adopted son claimed against one who came in by descent, here against one who has come in by survivorship. But is this a difference of such moment as to deprive the widow here of the power of adoption, which in that case was held to be vested in her. Though in *Raghunadha's* case the successor came in by descent, not by survivorship, still he had to be found within the limits of the joint family: and as the adopted son was held to be the true successor, it follows that his adoption must have brought him within that joint family. Therefore the fact that only one member of the joint family survived at the time of the adoption was not regarded there, and need not be treated here, as an obstacle in the way of an adoption within the joint family.

In *Raghunadha's* case the half-brother was divested wholly of the estate to the enjoyment of which he had succeeded, presumably because his title was inferior to that of the subsequently adopted son, and because he would not have succeeded had the adopted son been in existence at his father's death. So here also to the extent of the interest of Bhagwandas the adopted son had (apart from the question of the *quantum* of an adopted son's share in a joint family) a superior title to his father's interest

(1) (1888) 15 I. A. 51. (2) (1899) 26 I. A. 83.

over that of the plaintiff Bachoo, inasmuch as, had he been in existence as an adopted son at his father's death, he would have been entitled to that interest in preference to Bachoo. To the extent, therefore, of that interest, as it seems to me, he is, subject to qualification to which I have referred, entitled to succeed.

But then it is said that Mankorebai, though authorized by her husband, had under the circumstances no power to adopt in the absence of the consent of the person divested. This argument hangs on the fact that in Bombay a widow has under certain circumstances a power to adopt without her husband's authority, and is shaped as follows :—

Under the law prevailing throughout India (it is said) an adoption in the case of a joint family, when united, can only be by the authority of the husband or the consent of the *sapinda;* in Bombay the husband's authority is not necessary and is therefore of no value : therefore the consent of the *sapinda* is necessary. This argument appears to me to be founded on a fallacy and leads to the result that though the adopting powers of a widow have hitherto been regarded as ampler than in the other Presidencies, still for the purposes of an adoption into a joint family they are really less. But even were the argument otherwise sound—which I am far from conceding—it proceeds upon the fallacy that the power of a widow to adopt without the authority of her husband prevails as well when her husband was joint as when he was separate. But this is opposed to the view of a Full Bench of this Court in *Ramji* v. *Ghaman*[1], where it was held that for an adoption in a united family the husband's authority, *or* the *sapinda's* consent, is necessary.

Then it has been argued that the power itself is bad because it is a part of a scheme whereby Bhagwandas tried to make a disposition which the law would not allow. But in the first place this, if well founded, merely goes to the validity of the disposition, not of the power, and in the second place there has been no disposition, or attempt to make a disposition, which the law does not allow.

Then it is said that it is a condition precedent of the exercise of the power that an agreement should be made of the character

(1) (1879) 6 Bom. 498.

1904.

BAGHOO v. MANKORE-BAI.

indicated in clause 9 of the will and that no such agreement has been made. But apart from the answer afforded by the change of language apparent in clause 9—the transition from *must* to *should*, which points to monition rather than mandate as the purpose of the reference to the agreement—I fail to see how it can be said that there has not been a sufficient compliance with the requirements of the clause.

The clause provides that the testator's wife should enter into an agreement either with the adopted son (by which must be meant the person about to be adopted as a son) or his proper guardian, an alternative which suggests that it was in contemplation that either an adult or minor might be adopted. It was determined to adopt a minor, and so the agreement had to be, and in fact was, with the proper guardian. That agreement follows the directions of the will, and, so far as it goes, is binding on the guardian, and in this complies with the will. But then it is objected, it was not registered: but why should it be? The guardian had no interest in the immovable property, so that he could not create, declare, assign, limit or extinguish any right, title or interest therein.

For these reasons I hold that an exclusive title in the plaintiff is not established.

Failing then to establish the main purpose of this suit, those who represent the plaintiff ask us to decree partition, and have invited us to enter on a speculation as to the probable advantages that will flow from a partition at this stage. Among the matters advanced for our consideration was the suggestion (to which I have already alluded) that a son by adoption takes a diminished share. Inasmuch as I agree with Mr. Justice Tyabji's view that at present a partition is not desirable, and my opinion would not be altered, even if the appellant's contention that an adopted son takes a diminished share were well founded; I think it desirable to refrain from expressing any opinion on this point, but to leave it until such time as events shall call for its determination.

This brings me to the question whether the gift to Naval is valid.

In the course of the argument before us it was thought desirable that it should be ascertained whether the Government

Promissory Notes were purchased out of the corpus or the income of the estate and the parties were accordingly requested to procure the necessary information. This has delayed our disposal of the case, but the parties have now placed before us certain statements, accepted as correct by both sides, from which it appears that the Notes were purchased out of the income of the estate. On one point these statements require explanation; in the statement annexed to the joint affidavit of Gulabchand Motichand Damania and Gulabbhai Vasanji Desai it appears that the cash balance on the 24th October, 1900, was Rs. 34,994-9-1. This sum was for the most part made up of the proceeds of rice, and it is admitted on both sides that the rice was the produce for that year of the fields owned by the family, so that the amount realized was income. The question, therefore, to decide is whether Bhagwandas was entitled out of the income of the estate to make this gift to his daughter.

It should be borne in mind what the position of the family was at the date of the gift. Bhagwandas was the only living male member of the family, and his daughter, Naval, was the only female born in the family: and in the absence of the posthumous birth of a son or an adoption she was the person who in the ordinary course of events would probably become entitled to the whole estate. The value of the estate was from 10 to 15 lacs, so that even if the Government Promissory Notes had been purchased out of the corpus of the estate it would have represented only one-fiftieth part of the estate or possibly less. Now this income in the hands of Bhagwandas was not immovable property, nor was he under any obligation to invest it in immovable property: it was movable property. This distinction is not without importance.

In the Mitakshara c. i, s. 1, pl. 27, the conclusion arising out of a preceding discussion is thus stated: "Therefore it is a settled point that property in the paternal or ancestral estate is by birth [although] the father have independent power in the disposal of effects other than immovables for indispensable acts of duty, and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress, and so forth: but he is subject to the control of his sons and

1904.

BACHOO v. MANKORE-BAI.

the rest in regard to the immovable estate whether acquired by himself or inherited from his father or other predecessor."

Now there can be little doubt that Bhagwandas' gift to his only daughter was one "through affection," and the Mayukha treats a gift from a father to his daughter as a *gift of affectionate kindred* (Mayukha c. iv, s. vii, pl. 11—13, and compare *Hanmantapa* v. *Jiwubai*[1]). If it be objected that the texts to which I have referred relate only to a father's power of disposition against his own sons or descendants, then even accepting the objection for the sake of argument as well founded, it would not lead to the conclusion that the texts have no application here; for though the plaintiff is not a son of Bhagwandas, Nagardas is, and as against him the texts would apply, while those who represent him in this suit do not seek to impugn the gift, but admit its propriety.

It cannot be suggested that every gift by a father to his daughter out of joint property is good: reasonable limits must be observed (*Damodardas Maneklal* v. *Uttamram Maneklal*[2] or, as it is stated in the Viramitrodaya, "gifts by the parents out of favour or affection should be guided by propriety, but not by caprice" (c. vii, s. 5). Seeing then that the estate is of the value I have named, that at the date of the gift Bhagwandas was the only living person entitled to it, that Naval then was the only living issue of the two brothers, and that the gift was made out of the income of the estate, I am of opinion that the limits of propriety were not exceeded, and I do not think it can at this stage be said that the gift is invalid. If hereafter there is a partition, a question may perhaps be raised by Bachoo as to whether the amount of the gift should not be brought into account, but that is a matter with which we now have no concern.

The decree under appeal must, therefore, be varied so far as it was thereby declared that the 6th defendant was not entitled absolutely to the Government Promissory Notes and in place thereof it should be declared that she is so entitled, and we direct that the Notes and the interest accrued thereon in the hands of the receiver be carried to the credit of this suit to the account of Naval, that the cash be invested, and the interest accumulat-

(1) (1900) 24 Bom. 547; 2 Bom. L. R. 478. (2) (1892) 17 Bom. p. 282.

ed, and there will be special liberty to apply in respect of this amount to the Judge in Chambers on the Original Side.

Then objection has been taken by the appellant that the learned Judge should have directed the costs of issues 1, 2, 3, 4 to come out of the whole estate. But that is a matter on which the learned Judge was entitled to exercise his discretion, and, so far as he has refused to throw these costs on the whole estate, I see no reason to interfere.

I think, however, we ought to reserve to the next friend liberty to apply to provide for his costs out of the interest of the minor whom he represents, and that is the utmost we can do for him on the materials at present before us.

It will be open to him on any application he may make to show that he ought to be allowed his costs against the minor's interest not only as between party and party but also between Attorney and client, for though I do not wish to encourage the idea that reckless and costly litigation can be undertaken at a minor's costs with impunity—a danger against which we have specially to be on our guard—I cannot say that in this case the next friend has not acted with an intention to benefit the minor, though in the view we have taken the plaintiff's claim is founded on a misapprehension of the rights of the parties.

The costs of the appeal and cross-objections in this Court must be borne by the next friend, and so far as they cannot be recovered from him, there will be liberty to apply for recovery of them from the interest of the minor plaintiff or, if necessary, from the whole estate. The next friend will have the same liberty to apply in respect of his costs of the appeal as are reserved to him in respect of his costs in the first Court.

RUSSELL, J.:—Harkisondas and Bhagwandas Nagardas were two Hindus of Bombay, joint in food, worship and estate, and possessed of large property, moveable and immoveable, as their joint ancestral estate. Harkisondas died on the 14th September, 1900. Bhagwandas survived Harkisondas and died on the 17th December, 1900, leaving a widow, Mankorebai, and a daughter, Naval, the 4th and 6th defendants herein, and without male issue. The plaintiff is a posthumous son of Harkisondas and was born on the 18th of December, 1900. Bhagwandas made a

1901.

BACHOO v. MANKOREBAI.

will on the 30th of November, 1900, by which, *inter alia*, he appointed the defendants 1, 2 and 3 herein the executors. The material clauses in the will are set forth in paras. 11, 12 and 13 of the plaint herein. The plaintiff says that the said executors claim to be in possession of the property of Bhagwandas, but the latter had no power to dispose of the ancestral estate and no right to retain possession thereof against the plaintiff. The plaint goes on:

On becoming aware of the conduct of the said defendants 1, 2 and 3 the plaintiff's mother Gangabai applied to this Court, on the 31st January, 1901, to be appointed guardian of the person and property of the plaintiff. Notice of the said application and the day fixed for hearing was served on defendant 4, Mankorebai, the widow of Bhagwandas.

Thereupon the 4th defendant, Mankorebai, who alleges herself to be pregnant by her late husband, the said Bhagwandas Nagardas, was instigated by certain designing persons to attempt to prevent the appointment of a guardian of the property of the plaintiff by adopting a son to the said Bhagwandas Nagardas under a power which the document alleged to be the will of the said Bhagwandas purported to give her, and she accordingly, on the 17th February, 1901, purported to adopt the 5th defendant, Nagardas Pitamber, a boy of about 8 years old, as son to the said Bhagwandas Nagardas, and has since, with the said 5th defendant, appeared to oppose the appointment of a guardian of the property of the plaintiff on the ground that the said 5th defendant Nagardas Pitamber had by such adoption become coparcener with the plaintiff in the said property and that the plaintiff and the said Nagardas Pitamber held the same as joint ancestral estate.

The plaintiff submits that the said Bhagwandas could not make or by giving authority to his widow to adopt or otherwise enable his widow to make the said 5th defendant or any person adopted by her without the consent of the plaintiff as coparcener with the plaintiff or confer on such person any interest whatever in the ancestral property to which the plaintiff had become absolutely entitled.

The 17th of February, 1901, therefore was the date of the adoption of defendant 5, Nagardas Pitamber *alias* Nagardas, and it was performed with the consent of the persons named in the will. On the day before, *viz.*, 16th February, 1901, the agreement between the natural father of the minor and the widow of Bhagwandas had been executed.

The first and the chief question in this case, therefore, is—Is the said adoption valid according to Hindu Law? It appears from the facts above stated that on the date of the will of Bhagwandas, *viz.*, the 30th November, 1900, the plaintiff was *en ventre sa mere*, he not having been born till the 18th December,

1900. The argument for the plaintiff which was pressed before us was that inasmuch as the estate had vested in the plaintiff it would not be divested by the subsequent adoption of a son to Bhagwandas by the widow of the latter without the consent of the plaintiff. Now it appears to me that what was done by the adoption of defendant 5 was not a divesting of the estate of the plaintiff but the introduction by valid and legal means of another coparcener with him. Several times during the course of the argument the plaintiff was described as the "sole owner," "the absolute proprietor." In my opinion these expressions are apt to mislead. The plaintiff at the death of Bhagwandas was not the sole absolute proprietor in the strict sense of the words. He was the owner of an estate which according to Hindu law was liable to "open out" as it has been called, either by the birth of a son to Bhagwandas' widow, or by the adoption of a son by her in pursuance of her deceased husband's authority. He cannot properly be described as the sole or absolute owner or proprietor until the possibility of issue to Bhagwandas whether natural born or by adoption was extinct, and this view is in accordance with West and Bühler, 3rd edition, page 996, where it is said: "In the case of co-sharers standing on an equal footing, Indian lawyers certainly do not recognize any obstacle to adoption by the widow of one as arising from the estate on his death having vested in the other:" they regard death 'without male issue' (see page 598) as not having occurred until the death of the widow makes adoption impossible, nor apparently would the Judicial Committee countenance such a doctrine. See *Sri Raghunadha's case*[1]; and in the note to page 598 referred to, the learned authors say "On the death of a parcener without male issue, his share becomes extinct, because no partition has taken place in the family, and there has consequently been no ascertainment of the share of each parcener." *Sri Raghunadha's case* was followed in *Surendra Nandan* v. *Sailaja Kant Das*[2]; and if we were to hold this adoption invalid on the grounds suggested, we should be deciding contra to these cases. I would adopt and apply the portion of the judgment in *Vithoba* v. *Bapu*[3] in the following

(1) (1876) 3 I. A. 154. (2) (1891) 18 Cal. 385.
(3) (1892) 15 Bom. p. 19.

1904.

BACHOO v. MANKORE-BAI.

way:—"There may be no case in which an estate vested in a person *by inheritance* can be divested by the adoption of a son by a widow after her husband's death (cf. remarks at I. L. R. 2 Cal., 295 at page 305); but in an undivided family there is no succession by inheritance." On Bhagwandas' death his share in the undivided estate passed by survivorship to his brother's son who was then *en ventre sa mere*, but that interest was always liable to be defeated by an adoption by Bhagwandas' widows. "It is not regarded as divesting any more than a birth after a long gestation would be so regarded: see West and Bühler, p. 994, note (*c*)." The undivided Hindu family is a domestic body of which the sons of coparceners become members from their birth and in which from the moment thereof they acquire interests, but these interests are always subject to being diminished by the birth of other coparceners and by the fiction of adoption. In the present case the last surviving adult male owner gave his mandate to his wife by his will that she should cause his branch of the family to be continued therein by the adoption of a son to him, and in my opinion there was nothing illegal in her carrying out that mandate.

It was argued by Mr. Raikes that the husband's consent was irrelevant and that what the widow must have must be the consent of the kinsmen who are divested. But in the first place if my view as above expressed is correct, under circumstances like the present there is not a divesting of the estate. The authorities from the text books as to the widow's power to adopt are to be found in *Vithoba* v. *Bapu*[1], *Ranji* v. *Ghaman*[2], and the cases there referred to, and I do not propose to cite them at length. In the next place, here we have got the mandate of the husband, the then proper person to give it, and consequently the rights of the parties in actual possession are not "dependent on the caprice of a woman subject to all the pernicious influences which interested advisers are too apt in India to exert over women possessed of, or capable of exercising dominion over, property" as it was expressed in *Raghunadha's case*[3].

(1) (1890) 15 Bom. p. 129. (2) (1879) 6 Bom. 498.
(3) (1876) 3 I. A. 154 at p. 193.

The next point that arises is with regard to the agreement between the natural father and Mankorebai of the 16th February, 1901. It was argued that the passage in the will of Bhagwandas, *viz.*, "In the event of a son being born to my brother's widow, however, my wife should before making the adoption enter into an agreement with the adopted son or his proper guardian that such adopted son should be bound to accept as valid the provisions hereby made for my daughter Navalbai and my wife," made the adoption illegal as it was evident that the object of the adoption was with the view of making provision for his daughter and wife beyond what they would be entitled to according to Hindu law. I do not, however, think this contention is well founded, for by clause 10 of the agreement it is "lastly declared that the validity of the adoption of the said Nagardas Pitamber to be made by the said Mankorebai shall not in any way depend on, or be affected by, the validity or invalidity, legality or illegality, of this agreement or any term thereof, but it is the express intention of the parties hereto that the said Nagardas Pitamber shall be validly adopted by the said Mankorebai according to the Hindu law, notwithstanding anything hereinbefore contained."

The adoption, therefore, is wholly distinct from the agreement which is a condition subsequent rather than precedent to the adoption. How far, if at all, the adopted son may be affected by the provisions of that agreement is a question which does not arise at present.

The next point as to which exception is taken to Tyabji J.'s decree is that he declined to order a partition. On this point, I think, his decision is correct for two reasons: first if a partition were ordered the interests of the natural and the adopted son might be most injuriously affected inasmuch as each would lose his chance of the share of the other devolving upon him. In the second place the learned Judge exercised his discretion in the matter and I am not prepared to say he was wrong.

It now only remains to consider whether the daughter Naval is entitled to the Rs. 20,000 directed to be paid to her by the will. It was suggested during the argument by the learned Chief Justice that it was important to consider from what source the Rs. 20,000 came, *viz.*, from the corpus of the estate or the

1904

BACHOO v. MANKOREBAI.

income or savings of it in the testator's hands. Accordingly we heard evidence on the point the effect of which is that the Government Promissory Notes for Rs. 20,000 were purchased out of the income of the joint family property, and having regard to the extent of the property I do not think that Rs. 20,000 to his daughter was "a gift through affection" so large as to be unreasonable: see Mayne, p. 423 (6th Edition).

The decree will be varied accordingly and the order as to costs as set out in the judgment of the learned Chief Justice just delivered.

Attorneys for the appellant: Messrs. *Maganlal, Jamsetji and Gulabbhai.*

Attorneys for respondents: Messrs. *Edgelow, Gulabchand and Wadia*; and Messrs. *Mulji and Dharamsi.*

Decree varied.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

1904. *June*, 28.

JIVRAJ GULABCHAND (ORIGINAL DECREE-HOLDER), APPELLANT, *v.* BABAJI APA KHADAKE (ORIGINAL JUDGMENT-DEBTOR), RESPONDENT.*

Limitation Act (XV of 1877), sections 7, 9, 13, schedule II, article 179, clause (4)—Execution of decree—Application by minor after previous application presented in time by deceased decree-holder—Minor's application beyond time—Disability—Inability.

A decree-holder, after making various applications for execution of a decree, each of which was within time, died. His son, a minor, made an application for execution of the decree within three years of his father's death but more than three years after the date of his deceased father's last application.

Held that under section 9 of the Limitation Act (XV of 1877) the minor's application for execution was time-barred, it not being a case of initial disability but of subsequent disability.

PER JENKINS, C. J.—Inability to sue is distinct from disability which means want of legal capacity and for the purposes of the Limitation Act (XV of 1877) is the state of being (as section 7 indicates) a minor, insane or an idiot. A subsequent disability does not stop time that has once begun to run.

Lolit Mohun v. *Janoky Nath*(1) distinguished.

* Second Appeal No. 152 of 1904.

(1) (1893) 20 Cal. 714 at p. 716.